No. 20761

In the United States Court of Appeals for the Ninth Circuit

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

UNITED BROTHERHOOD OF CARPENTERS & JOINERS OF AMERICA, LOCAL 1281, AFL-CIO, RESPONDENT

ON PETITION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

REPLY BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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The purpose of this reply brief is to correct certain factual misstatements in the Union's answering brief, and to discuss a procedural defense never previously adverted to by the Union and, therefore, not treated in our opening brief.

I

The Union's principal defense to the merits of the Board's unfair labor practice finding is that the Company never made an adequate request for DiBoff's referral. However, the Union's contention in this respect is based upon a series of misconceptions as the record evidence.

1. Thus, the Union contends (Br. p. 3) that while a specific request for a particular carpenter can be

227-341—66

made through the carpenter himself, "this expedient is extracontractual, and can be practiced only when such a referral would not be inconsistent with known facts or a reasonable belief that an employer is not requesting a particular employee." From this, the Union apparently concludes that all "requests" for DiBoff made by the Company—except those made by Woodward on June 23, Taylor in July and Cleveland in September—were somehow defective. However, the Union has neglected to cite any record support for this description of the parties' referral practice—or, indeed, for most of the other factual assertions in its brief.

Moreover, the only record evidence with respect to the procedure of specifically requesting carpenters through the carpenters themselves—namely, the testimony of Business Agent Powell—provides no support for the alleged limitation asserted by the Union. Powell's testimony on this procedure is as follows (Tr. 25–26):

> Q. As a matter of practice, how do employers request men from Local 1281, telephone?
>
> A. Sometimes by phone, sometimes in writing, some of the employers designate as per the contract who is entitled to make the request for men, they notify us in writing who is allowed by their company, who is allowed to request men. However, this is not strictly enforced by the employers or by ourselves. We know through practice what we are dealing with, we recognize names over the phone and we know beyond any doubt whether the request is legitimate or not legitimate.

Q. Isn't it also customary to give men dispatch slips who come into the hall and tell you that they have a job opportunity with one employer or another?

A. Yes. If a carpenter comes into the hall and tells me that I was sent in by John Doe to pick up a dispatch to go to work in the morning, we usually know the carpenter and employer and there is no reason, if a man picked up a dispatch and didn't have a job, the employer would send him back to town anyway.

Q. So you normally don't question this practice?

A. We have enough confidence in our men and in most cases the employer, we don't question them usually.

Q. Well, when a man comes in in this situation indicating he has a job with John Doe Construction Company, you treat this as a request by that company for this man by name?

A. That is correct.

Thus there is no foundation for the Union's assertion that since Link Morse (the Company's then superintendent) may not himself have called the Union in early June to ask for DiBoff's dispatch, DiBoff's statement to Powell that he had a job waiting for him with the Company if he could obtain a referral "was not true and could not be proven" (Br. p. 5). The Union's corresponding inference that, therefore, DiBoff was not specifically requested before June 23 is also defective. First, at the hearing Woodward corroborated DiBoff's statements to Powell that the Company (through then foreman—later superintendent—Woodward) had asked DiBoff to obtain a referral slip in early June (Tr. 112–113).

Secondly, this statement by DiBoff to Powell did constitute a specific request by conforming to the established procedure set forth by Powell (Tr. 25–26). Finally, if Powell questioned the "truth" of DiBoff's claim that the Company was requesting him, or if (as the Union suggests) DiBoff's claim was "inconsistent with known facts or a reasonable belief," Powell need only have telephoned the Monta-Vista job to confirm or deny DiBoff's representation. This Powell failed to do. In the alternative, Powell could have dispatched DiBoff since "if a man picked up a dispatch and didn't have a job, the employer would send him back to town anyway" (Tr. 25–26). This Powell likewise failed to do. The record incontrovertibly establishes (as Powell must have suspected) that if Powell had taken either course, the company would have hired DiBoff.

Finally, the Union's additional contention that Woodward's promise of a job to DiBoff if he could get a referral "was not adequate as a request" (Br. p. 7) is irrelevant. Certainly, there is no request when an employer tells a carpenter to pick up a referral slip and go to work. The request occurs when either the employer or the carpenter communicates this fact to the Union (Tr. 25–26). This DiBoff did, in complete conformity to the established procedure, on an almost daily basis for the entire period from early June until September 10 (Tr. 49–50, 186–187). Therefore, the Board properly held that DiBoff had been specifically requested by the Company throughout this entire period.

2. Nor does the record support the Union's further contention (Br. p. 4) that there is no such thing as a "continuing request" for referral, and alternatively that if such a request did exist, there is no "competent" evidence to support the contention that Powell knew of this request (Br. p. 13). On the contrary, the testimony of one of the Union's own officers and agents does substantiate the existence of a "continual request" in this case and Powell's knowledge of this request. Peter Lannen, the Union's Financial Secretary from June 1955 to late August 1963 (Tr. 182), testified that in June 1963, he[1] instructed DiBoff to sign up on List No. 1 (Tr. 183–186); that, as an officer and agent of the Union, Lannen worked full time (eight hours a day, six days a week) at the Union hall during this period (Tr. 186); that, in his official capacity, he handled 25 percent of the dispatches from the hiring hall (Tr. 222–223); that he had knowledge that the Company had a "continual request" for DiBoff from early June through late August 1963 (Tr. 186); that he had spoken to Powell at length on many occasions concerning the matter (Tr. 187, 196–197); and that he was "certain" Powell had similar knowledge of this request (Tr. 187). In addition, Powell himself admitted that DiBoff came into the hall "very frequently" during the summer of 1963 to get a referral to either Monta-Vista or Adak (Tr. 49–50) and likewise admitted that he was "not very happy with

[1] Not Ben Perkins, as the Union erroneously asserts (Br. p. 4).

DiBoff * * * because of the lengths to which he went to get dispatched" (G.C. Exh. 15, p. 3).

Thus, there is "competent" evidence to support the Board's finding that the Company continuously requested DiBoff throughout this entire period and that Powell knew it. Moreover, as shown above, the Company made specific requests through DiBoff in strict accordance with established procedure almost daily throughout this period. Whether there was a series of everyday independent requests or one long "continual" request is immaterial.

3. The Union contends (Br. pp. 8–9) that the Company's "original request was rescinded and withdrawn," since if the Company intended that its original request be continual "why was a second specific request made for him in July?" (Br. p. 14). The short answer to this rhetorical question is that in June the request was made by Woodward for work at Monta-Vista (Tr. 114) and in July the request was made by Taylor for work at Adak (Tr. 290–291).

4. The Union's additional assertion that during this entire period "as individual openings appeared, other men were specifically requested for each such opening" (Br. p. 14) is completely unfounded and unsupported in the record. Union Business Agent Powell specifically testified that at one point in the middle of July he had exhausted the names on List No. 1, and had to refer List No. 2 men to Monta-Vista (Tr. 283). Company Superintendent Woodward testified that after his request for DiBoff had been turned down he made an "open request" for carpenters (Tr. 114). Finally, there is no evidence that any

List No. 2 men, other than Osnes, Nicolaysen and DiBoff, were ever specifically requested by the Company for either Monta-Vista or Adak. In addition, if at any time Powell doubted the truth of DiBoff's claim of a specific request or had reason to believe that the Company had in any way "rescinded and withdrawn" its request, he need only have telephoned Woodward and Taylor to ascertain whether this were true. His failure to do this for a period of more than 3 months—notwithstanding his "very frequent" difficulties with DiBoff—indicates Powell's belief that the Company would confirm DiBoff's claim.[2]

II

In its defense, the Union for the first time now claims (Br. p. 17–18) that the Board committed error in not requiring that DiBoff "first resort to the grievance procedure" contained in the collective bargaining agreement in effect between the Company and the Union. This argument is defective in several respects.

[2] There is no record basis for the Union's apparent implication (Br. pp. 6, 11–12) that the Company may have withdrawn its specific request for DiBoff because of his age. Indeed, the testimony of Woodward establishes the opposite conclusion, since he testified that "in carpenters neither age or youth would make any difference" (Tr. 126); that he wanted DiBoff as he was a "finished" carpenter with a reputation for doing good work and being trustworthy (Tr. 111–112); and that "I felt personally that he could do the work" (Tr. 126). As between Osnes, Nicolaysen and DiBoff, Woodward "did not prefer any one of the three over the others" (R. 23; Tr. 126–127). Finally, the Company did in fact hire DiBoff as soon as he obtained a referral slip.

Section 10(a) of the Act provides in relevant part that the Board's power to prevent unfair labor practices "shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law or otherwise * * *." Thus, the language of the Act itself, as well as the court decisions affirming the Board's interpretation of this Section, makes clear that the jurisdiction of the Board to decide whether unfair labor practices have occurred may not be restricted by the availability of contract procedures for the impartial settlement of disputes, nor by an actual award or decision thereunder.[3] As this Court has stated, in the absence of "extraordinary circumstances" the extent to which the Board chooses to exercise its statutory jurisdiction is a matter of administrative policy within the Board's discretion and is not a question for the courts.[4] The Union has not shown any such circumstances warranting disapproval of the Board's assertion of jurisdiction in the case at bar.

It is true that the Board may on occasion, in the exercise of its discretion, decline to exercise its juris-

[3] *Amalgamated Utility Workers* v. *Consolidated Edison Co.*, 309 U.S. 261, 264–265, 267–269; *National Licorice Co.* v *N.L.R.B.*, 309 U.S. 350, 365; *N.L.R.B.* v. *Walt Disney Productions*, 146 F. 2d 44, 47–49 (C.A. 9), cert. denied, 324 U.S. 877; *Lummus Co.* v. *N.L.R.B.*, 339 F. 2d 728, 732–733 (C.A.D.C.); *N.L.R.B.* v. *Thor Power Tool Co.*, 351 F. 2d 584, 587 (C.A. 7); *cf. Local 174, Teamsters* v. *Lucas Flour Co.*, 369 U.S. 95, 101; *Smith* v. *Evening News Association*, 371 U.S. 195, 197, 198; *Carey* v. *Westinghouse Electric Corp.*, 375 U.S. 261, 270–272.

[4] *N.L.R.B.* v. *Carroll-Naslund Disposal, Inc.*, 359 F. 2d 779, 780 (C.A. 9). Accord: *Haleston Drug Stores* v. *N.L.R.B.*, 187 F. 2d 418, 421 (C.A. 9), cert. denied, 342 U.S. 815; *N.L.R.B.* v. *Harrah's Club*, 62 LRRM 2507, 2508, 53 L.C. para. 11,316 (C.A. 9, No. 20,270, June 14, 1966).

diction with respect to unfair labor practice questions which have been, or could have been, submitted to arbitration under the collective bargaining agreement between the parties, for the purpose of achieving the "desirable objective of encouraging the voluntary settlement of labor disputes." *Spielberg Manufacturing Company,* 112 NLRB 1080, 1082. The Board has done so where there is an outstanding arbitration award and "the proceedings appear to have been fair and regular, all parties had agreed to be bound, and the decision of the arbitration board is not clearly repugnant to the purpose and policies of the Act" (*Spielberg Manufacturing Company, supra* at 1082). The Board has also stated that it may defer to arbitration even though there is no arbitration award, but the parties could invoke the grievance procedure and the existence of the unfair labor practice turns primarily on an interpretation of specific contractual provisions within the special competence of an arbitrator to determine, and comes to the Board in a context that makes it reasonably probable that arbitration settlement of the contract dispute would also put at rest the unfair practice controversy in a manner sufficient to effectuate the policies of the Act. *Cloverleaf Division of Adams Dairy Co.,* 147 NLRB 1410, 1416; *C & S Industries,* 158 NLRB No. 43.[5] The Board has never "shunned jurisdiction merely because a party had the contractual right to go to arbitration but has never exercised the option." *Aerodex, Inc.,* 149 NLRB 192, 199; *Aetna Bearing Company etc.,* 152 NLRB 845, 851.

[5] See also, *Crown Zellerbach Corp.*, 95 NLRB 753, 753–754; *Montgomery Ward & Co., Inc.*, 137 NLRB 418, 423.

Since the Union failed to raise this matter at an earlier stage in this proceeding,[6] there is no evidence in the record to establish that this case falls within either of the two categories mentioned above. Nothing in the record shows that DiBoff actually filed a grievance, or that there is any outstanding arbitration award. Nor does this case fall into the second category, since there is no evidence: (1) that DiBoff had actual knowledge that the grievance procedure existed, *Lummus Company,* 142 NLRB 517, 518 *enf'd.* as to this point, 339 F. 2d 728, 732–733 (C.A.D.C.); (2) that DiBoff, as a "non-employee", could actually file a grievance, *Thor Power Tool Company,* 148 NLRB 1379, 1381, *enf'd.* 351 F. 2d 584 (C.A. 7); (3) that the arbitrator would consider the same issue as that presented to the Board in this case, *Cloverleaf Division of Adams Dairy Co., supra,* and *Thor Power Tool Company, supra,* 148 NLRB at 1389;[7] and (4) that the arbitrator would award DiBoff backpay and thus restore the *status quo ante*

[6] Thus, the Union failed to file cross-exceptions as permitted by Section 102.46(e)(h) of the Board's rules and regulations. Cf. *N.L.R.B.* v. *Ochoa Fertilizer Co.*, 368 U.S. 318; *N.L.R.B.* v. *Pinkerton's National Detective Agency*, 202 F. 2d 230, 232–233 (C.A. 9); *Local 901, International Brotherhood of Teamsters* v. *Compton*, 291 F. 2d 793, 796 (C.A. 1).

[7] The Board found that the Union's refusal to refer DiBoff was unlawful because it was motivated by his intraunion and other protected activities. Since it was unnecessary for the Board to decide whether the refusal to refer him was also a violation of the collective bargaining agreement, the propriety of the Board's decision is in no way affected by the resolution of this issue. Accordingly, this Court's decision in *N.L.R.B.* v. *C & C Plywood Corp.*, 351 F. 2d 224, cert. granted, April 18, 1966, is irrelevant to the case at bar.

in a manner which would effectuate the policies of the Act, *Thor Power Tool Company, supra,* 148 NLRB at 1390. To accept the Union's argument at this late date, after an extensive hearing and the rendering of a determination, would only promote litigation and prolong the existing labor dispute and thus would not effectuate the policies of the Act.

Moreover, even if there were evidence in the record placing this case in the second category mentioned above, the Board would in all probability have exercised its jurisdiction in this case. The Board has consistently declined to defer to the grievance process where, as here (G.C. Exh. 2(a), pp. 7–8), the grievance would be submitted to a bipartite committee, composed of representatives of the contracting parties who would be arrayed in common interest against the grievant. *Roadway Express, Inc.* 145 NLRB 513, 514, 515. Because a claim of job discrimination effected through an exclusive union hiring hall "inevitably imputes misconduct to the contracting parties (employers, at least indirectly, since the Union acts for the signatory employers in administering the hiring hall provisions) [, such] review provisions could obviously have the effect of placing the [grievant] at the mercy of agents of parties that have a community of interest and are charged, either directly or indirectly, with the misconduct." *Local Union 469, etc.* (*Associated Plumbing etc. Contractors of Arizona*) 149 NLRB 39, 45–46; *Lummus Company,* 142 NLRB 517, 518, *enf'd.* as to this point, 339 F. 2d 728, 732–733 (C.A.D.C.); *Iron Workers, Local 433, etc.* (*Kaiser Steel Corporation*) 151 NLRB 1092, 1100.

CONCLUSION

For the foregoing reasons, as well as those stated in our opening brief, it is respectfully submitted that the Board's order should be enforced in full.

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CERTIFICATE

The undersigned certifies that he has examined the provisions of Rules 18 and 19 of this Court and in his opinion the tendered brief conforms to all requirements.

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